117 (4)

No. 08-754

Supreme Court, U.S.
FILED
JAN 23 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RICHARD SINGLETON, RUTH SINGLETON and AMY SINGLETON,

Petitioners,

v.

VOLKSWAGEN OF AMERICA, INC., and VOLKSWAGEN AG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

JEFFREY T. EMBRY
HOSSLEY & EMBRY, L.L.P.
320 South Broadway, Suite 100
Tyler, TX 75702
(903) 526-1772

CARL ROTH
THE ROTH LAW FIRM
115 N. Wellington, Suite 200
Marshall, TX 75670
(903) 935-1665

MARTIN J. SIEGEL
Counsel of Record
LAW OFFICES OF
MARTIN J. SIEGEL, P.C.
815 Walker St., Suite 1600
Houston, TX 77002-5721
(713) 226-8566

MICHAEL C. SMITH
SIEBMAN, REYNOLDS, BURG,
PHILLIPS & SMITH, L.L.P.
713 South Washington Ave.
Marshall, TX 75670
(903) 938-8900

Attorneys for Petitioners

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. Volkswagen is Wrong In Claiming that the Majority's Decision Follows this Court's Mandamus Precedent 2

II. This Case Squarely Presents the Conflict Over Mandamus Review for Abuse of Discretion in § 1404(a) Cases 4

A. Mandamus is Unavailable to Review Transfer Rulings for Abuse of Discretion Regardless of Whether They Contain Errors of Law or Errors of Fact 5

B. The Fifth Circuit Merely Substituted its Judgment for that of the District Court 7

III. Supervisory Mandamus is Inapplicable 10

CONCLUSION 13

TABLE OF CITED AUTHORITIES

Page

Cases:

A. Olinick & Sons v. Dempster Bros., Inc.,
365 F.2d 439 (2d Cir. 1966) 11

Banker's Life & Cas. Co. v. Holland,
346 U.S. 379 (1953) 2, 3, 6, 11

Cheney v. U.S. Dist. Ct.,
542 U.S. 367 (2004) 2, 4

DeBeers Consol. Mines v. U.S.,
325 U.S. 212 (1945) 3

Ex Parte Park Square Auto. Station,
244 U.S. 412 (1917) 6

Hoffman v. Blaski,
363 U.S. 335 (1960) 5

I.C.C. v. U.S. ex rel. Campbell,
289 U.S. 385 (1933) 6

In re Catawba Indian Tribe of S. Carolina,
973 F.2d 1133 (4th Cir. 1992),
cert. denied, 507 U.S. 972 (1993) 4

In re Federal-Mogul Global, Inc.,
300 F.3d 368 (3d Cir. 2002),
cert. denied, 537 U.S. 1148 (2003) 6-7

Cited Authorities

Page

In re Horseshoe Entertainment,
337 F.3d 429 (5th Cir.),
cert. denied, 540 U.S. 1049 (2003) 8-9

In re McDonnell-Douglas Corp.,
647 F.2d 515 (5th Cir. 1981) 8

In re Scott,
709 F.2d 717 (D.C. Cir. 1983) 6

In re Toyota Motor Corp.,
No. 08-41323 (5th Cir., Dec. 19, 2008) 12

In re TS Tech USA Corp.,
__ F.3d __, 2008 WL 5397522
(Fed. Cir., Dec. 29, 2008) 12

In re Volkswagen, AG,
371 F.3d 201 (5th Cir. 2004) 9, 12

Kerr v. U.S. Dist. Ct.,
426 U.S. 394 (1976) 6

LaBuy v. Howes Leather Co.,
352 U.S. 249 (1957) 10, 11, 12

Mallard v. U.S. Dist. Ct.,
490 U.S. 296 (1989) 2, 3, 4

Cited Authorities

Page

Schlagenhauf v. Holder,
379 U.S. 104 (1964) 10, 11

Sunbelt Corp. v. Noble, Denton & Assoc., Inc.,
5 F.3d 28 (3d Cir. 1993) 5-6

Time, Inc. v. Manning,
366 F.2d 690 (5th Cir. 1966) 8

Will v. U.S.,
389 U.S. 90 (1967) 6, 11

Statutes:

28 U.S.C. § 1404 ..... *passim*

28 U.S.C. § 1406 3

Other Authorities:

17 James W. Moore, *Moore's Federal Practice*
3d § 111.13 (3d ed. 1997) 8, 9-10

15 Charles Alan Wright, Arthur R. Miller &
Edward H. Cooper, *Federal Practice and*
Procedure: Jurisdiction § 3855 (3d ed. 2007)
..... 5

INTRODUCTION

Civil procedure professors who support the granting of certiorari in this case estimate that over ten thousand § 1404(a) rulings issue each year. *See* Brief of Civil Procedure Law Professors as *Amici Curiae* at 13. At stake here is whether courts of appeals may intervene in these cases before final judgment, reweigh the applicable factors and determine the venue themselves – or whether they will honor the long-established rule limiting mandamus to those decisions exceeding the district court's power and jurisdiction.

Volkswagen argues that the decision below is correct because it comports with this Court's mandamus precedent, because courts agree that errors of law are subject to interlocutory correction via mandamus, and because the Fifth Circuit acted within its authority to supervise the district courts. Each of these defenses falls short. This Court should grant certiorari to resolve the persistent conflicts and confusion surrounding mandamus review of transfer rulings and reaffirm the vitality of the final judgment rule.[1]

---

[1] In their Petition, the Singletons noted that, as of the time of filing, the Fifth Circuit had not yet ruled on their motion to stay the mandate pending decision on certiorari. Pet. at 11 n.3. On December 11, 2008, the court denied the motion "without prejudice to filing a further motion if certiorari is granted." The case remains docketed in the Eastern District, as no party has moved to effect the transfer and it has not occurred *sua sponte*, and substantial additional discovery remains before the case will be ready for trial.

ARGUMENT

I. Volkswagen is Wrong In Claiming that the Majority's Decision Follows this Court's Mandamus Precedent

Volkswagen argues initially that the decision below is faithful to this Court's mandamus precedent, but its argument rests on wrenching the phrase "clear abuse of discretion" from the context in which it appears in *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367 (2004), and *Mallard v. U.S. Dist. Ct.*, 490 U.S. 296 (1989). *See* Opp. at 8-12. The court below also relied heavily on *Cheney* in this regard. App. 7a.

It is clear that, when read in context, the phrase "clear abuse of discretion" in *Cheney* and *Mallard* refers specifically to action by the trial court beyond its power or jurisdiction. In *Cheney*, which turns on the unique characteristics of litigation involving the Chief Executive, both the sentence in which the phrase appears and the preceding sentence discuss extra-jurisdictional action. *See* 542 U.S. at 380. In *Mallard*, this Court found that the district court "plainly acted beyond its 'jurisdiction.' " In *Mallard*, this Court found that "the District Court plainly acted beyond its 'jurisdiction' as our decisions have interpreted that term." 490 U.S. at 309.

More importantly, in using the phrase "clear abuse of discretion," the *Cheney* and *Mallard* Courts were quoting *Banker's Life & Cas. Co. v. Holland*, 346 U.S. 379 (1953). *See* 542 U.S. at 380; 490 U.S. at 309. *Banker's Life*, in turn, makes clear that mandamus is unavailable except in cases of "abuse of judicial power," and that "jurisdiction need not run the gauntlet of reversible errors." 346 U.S. at 382. *Banker's Life* specifically

rejected mandamus as an avenue to review transfer orders that, as here, are properly within the district court's jurisdiction because such rulings, "even if erroneous," are "reviewable upon appeal after final judgment." *Id.* at 382-83. Because it involves the closely related provision at 28 U.S.C. § 1406(a), *Banker's Life* is obviously the most apposite decision here, but Volkswagen devotes all of one sentence to it. Opp. at 11.

It is also notable that the relevant passage in *Banker's Life* reserves mandamus for "the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' *of the sort held to justify the writ in DeBeers Consol. Mines v. U.S.*, 325 U.S. 212, 217 [(1945)]." 346 U.S. at 383 (emphasis added). In *DeBeers*, this Court used mandamus to overturn an injunction the district court lacked statutory or equitable power to enter, observing that mandamus should "not be availed of to correct a mere error in the exercise of conceded judicial power. But when a court has no judicial power to do what it purports to do – when its action is not mere error but usurpation of power – the situation falls precisely within" the All Writs Act. 325 U.S. at 217. Here, the district court was surely "exercis[ing] conceded judicial power," *id.*, when it ruled on Volkswagen's § 1404(a) motion, even if it erred and should have transferred the case. *See* App. 33a ("even the majority does not contend that the district court exceeded its power or authority under § 1404(a)"). Thus, this not remotely a case "of the sort held to justify the writ in *DeBeers*." 346 U.S. at 383.

Like the seven dissenters here, the Fourth Circuit also takes the view that "*Mallard* explicitly equates

'clear abuse of discretion' with the 'usurpation of the judicial power' standard." *In re Catawba Indian Tribe of S. Carolina*, 973 F.2d 1133, 1136 n. 2 (4th Cir. 1992), *cert. denied*, 507 U.S. 972 (1993); *accord* App. 31a, 33a, 41a-46a. To the degree there are differing interpretations of the meaning of "clear abuse of discretion" in this setting, and uncertainty caused by the interplay between *Cheney* and *Mallard* and previous mandamus decisions like *Banker's Life*, this confusion should now be resolved by this Court.

In sum, Volkswagen's attempt to harmonize the decision below with this Court's mandamus precedent rests on a misreading of *Cheney* and *Mallard* and entirely ignores innumerable other decisions of this Court stretching back well over a century. *See* Pet. at 15-16 (collecting cases).

II. This Case Squarely Presents the Conflict Over Mandamus Review for Abuse of Discretion in § 1404(a) Cases

Volkswagen essentially concedes that the circuits are divided regarding use of the All Writs Act to review transfer orders for abuse of discretion. *See* Opp. at 2-3, 12. It argues instead that any conflict is irrelevant because (i) all courts agree that mandamus is appropriate to correct errors of law in § 1404(a) rulings, and (ii) nothing more occurred here. It is wrong on both counts.

A. Mandamus is Unavailable to Review Transfer Rulings for Abuse of Discretion Regardless of Whether They Contain Errors of Law or Errors of Fact

Volkswagen claims – mistakenly – that the Singletons agree that mandamus is appropriate to review transfer orders where "only a question of law is presented." Opp. at 13. This misreading of the Singletons' position appears to stem from the petition's quotation of two passages from Wright and Miller's treatise. *Id.* at 13-14. The first passage notes that mandamus review is not controversial "if the issue goes to the power of the district court to make the order it did and only a question of law is presented." 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3855 at 325 (3d ed. 2007); Pet. at 11-12. This sentence makes clear that both the power of the district court *and* a question of law must be involved to justify mandamus; it cannot be read to mean that mandamus is available to correct non-jurisdictional legal errors.

The second passage refers to errors of law such as "transferring a case to a forum that is not proper under the statute, or considering an impermissible factor in passing on the motion, or by failing to give a proper hearing to the parties." *Id.* at 330; Pet. at 12. Significantly, though, these errors implicate the power of the district court under § 1404(a). Thus, because § 1404(a) requires that transfer be to a district where the case "might have been brought," courts lack power to transfer a case somewhere else. *See Hoffman v. Blaski*, 363 U.S. 335, 342-44 (1960); *Sunbelt Corp. v. Noble*,

Denton & Assoc., Inc., 5 F.3d 28, 30 (3d Cir. 1993). Similarly, because the section requires transfer to be "for the convenience of parties and witnesses, in the interest of justice," some courts have granted mandamus on the ground that district courts lack power to base the decision on totally unrelated considerations, such as the district court's distaste for a certain category of cases. *See, e.g., In re Scott*, 709 F.2d 717, 721-22 (D.C. Cir. 1983).

More importantly, this Court's mandamus decisions make clear that errors of law do not support mandamus relief absent some action beyond the trial court's jurisdiction or power. In *Banker's Life*, as here, the petitioner complained of a legal error by the district court, namely, its rejection of a co-conspiracy or agency theory of venue. *See* 346 U.S. at 380-81. Still, this Court held mandamus unavailable because "the *ruling on a question of law* decisive of the issue . . . was made in the course of the exercise of the court's jurisdiction to decide issues properly brought before it." *Id.* at 382 (emphasis added). As Justice Cardozo observed in *I.C.C. v. U.S. ex rel. Campbell*: "Errors of law in the discharge of a function essentially judicial are not subject to be corrected through the writ of mandamus any more than errors of fact." 289 U.S. 385, 393 (1933). Several other of this Court's decisions have denied mandamus relief though the action complained of was a purported error of law. *See, e.g., Kerr v. U.S. Dist. Ct.*, 426 U.S. 394, 402-06 (1976) (applicability of privilege); *Will v. U.S.*, 389 U.S. 90, 94-99 (1967) (whether government must disclose criminal trial witnesses); *Ex Parte Park Square Auto. Station*, 244 U.S. 412, 414-15 (1917) ("clearly erroneous construction of the statute"); *accord In re*

Federal-Mogul Global, Inc., 300 F.3d 368, 384 (3d Cir. 2002) (in § 1404(a) case, "clear error of law [must] at least approach[] the magnitude of an unauthorized exercise of judicial power") (internal quotations omitted), *cert. denied*, 537 U.S. 1148 (2003).

Thus, even if Volkswagen were correct in its claim that the district court's transfer ruling resulted from legal error, there is still no basis for mandamus as long as the court acted within its power and jurisdiction in considering and deciding Volkswagen's motion one way or the other. If mandamus is to be available every time a court of appeals concludes that a trial judge has made a legal error in a pretrial ruling like a § 1404(a) order, very little will remain of the final judgment rule – even if such errors are dramatized by calling them "clear" or "patent."

B. The Fifth Circuit Merely Substituted its Judgment for that of the District Court

In any event, Volkswagen's description of the district court's decision as the product of "a series of grave and recurring legal errors" is inaccurate. Opp. at 1. Volkswagen argues initially that the district court erroneously overvalued the plaintiff's choice of forum by referring to it as "a paramount consideration," treating it as a separate factor weighed with the others, and stating that the balance should "*substantially* weigh[] in favor of transfer." Opp. at 15-22. As the dissent recognized, however, these

formulations are commonplace in § 1404(a) rulings. App. 35a. Moore's treatise confirms the point:

> As a general rule, the plaintiff's choice of forum is given significant weight and will not be disturbed unless the other factors weigh substantially in favor of transfer. The amount of deference given to the plaintiff's choice of forum ranges from considering it the "paramount" concern, to considering it merely one of the many relevant factors, with various formulations in the middle.

17 James W. Moore, *Moore's Federal Practice* 3d § 111.13[1][c] at 111-68 (3d ed. 1997).

Regardless of the boilerplate phraseology, the district court fully considered the other standard § 1404(a) factors and expressly stated that "decisive weight" had not been given to the Singletons' choice of forum, but that it was simply one of many factors in play. App. 79a. And previous Fifth Circuit decisions – good law at least until the decision below – have used similar language. *See, e.g., In re McDonnell-Douglas Corp.*, 647 F.2d 515, 517 (5th Cir. 1981) ("unless the balance is strongly in favor of the defendant," plaintiff's choice should not be disturbed); *Time, Inc. v. Manning*, 366 F.2d 690, 698 (5th Cir. 1966) (treating plaintiff's choice as separate factor). Indeed, in one of the recent Fifth Circuit decisions Volkswagen claims the district court ignored, the court held that "the plaintiff's choice of forum is clearly a factor to be considered but in and of itself it is neither conclusive nor determinative."

In re Horseshoe Entertainment 337 F.3d 429, 434 (5th Cir.), *cert. denied*, 540 U.S. 1049 (2003); Opp. at 30. That is exactly how the district court treated the issue here.[2]

The same is true as to the other asserted legal errors. Volkswagen claims that the district court ignored a prior Fifth Circuit case, *In re Volkswagen, AG*, 371 F.3d 201 (5th Cir. 2004) ("*Volkswagen I*"), regarding the significance of distances over 100 miles. Opp. at 23-24. But the district court recognized and distinguished *Volkswagen I* because the distances involved there were far greater, and the first panel of the Fifth Circuit to consider Volkswagen's mandamus petition in this case agreed. App. 88a, 73a-75a. Nor did the Fifth Circuit hold in *Volkswagen I* that the 100-mile threshold is an inflexible command requiring transfer in all cases, either as a matter of witness convenience or because of the availability of compulsory process. *See Volkswagen I*, 371 F.3d at 204-05 and n.4. Regarding the "sources of proof" factor, the district court's recognition that it carries less weight today is widely shared. *See* 17 *Moore's*

---

[2] Volkswagen repeatedly accuses the district court of error because no factor favors Marshall. *See* Opp. at 15, 21, 28. But the question presented by the motion was whether Volkswagen carried its burden, however defined, to show that transfer would materially advance convenience and justice. Given the negligible distances involved, the absence of significant documents in Dallas, Volkswagen's failure to identify key witnesses or those truly likely to testify, and the fact that only two people objected to making what is only a two-hour drive on a major highway (assuming they would actually appear at trial), the court was well within its discretion in concluding that Volkswagen failed to carry its burden. The question was not what factors favor Marshall.

§ 111.13[1][h] at 111-85. As for the "local interest" factor, the district court held that the Dallas location of the incident gave that forum a "slight" edge; it simply also acknowledged that, in a products liability case, consumers elsewhere have some interest too. App. 88a, 91a.

In the end, issues such as the relative inconvenience imposed by this or that driving distance or the relative significance of competing local interests are questions of judgment and degree endemic to § 1404(a) balancing – as witnessed by the repeated differences so many judges have expressed over the facts in this case. The fundamental question presented here is whether these judgment calls are to be made by the district courts or the courts of appeals. In this case, the Fifth Circuit simply intervened before judgment, proceeded factor-by-factor, subtracted weight from the plaintiff's choice of forum, added weight to the witness travel factor and others, and ordered transfer. There is no description for this exercise other than reweighing and rebalancing.

III. Supervisory Mandamus is Inapplicable

Finally, Volkswagen invokes *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957) and *Schlagenhauf v. Holder*, 379 U.S. 104 (1964) to argue that the *en banc* majority properly acted to supervise and correct the district court. Opp. at 29-34.

LaBuy and *Schlagenhauf* involved district courts that exceeded their power by repeatedly and deliberately violating court-promulgated rules. In

LaBuy, the orders in question were called "beyond the [trial] court's power," and this Court referred to the district court as having engaged in "little less than an abdication of the judicial function." 352 U.S. at 254, 256. In *Schlagenhauf*, this Court described the question presented as involving "a substantial allegation of usurpation of power." 379 U.S. at 111; *accord A. Olinick & Sons v. Dempster Bros., Inc.*, 365 F.2d 439, 446 (2d Cir. 1966) (Friendly, J., dissenting) (*LaBuy* represents "traditional use of mandamus" because trial court exceeded its power). As discussed throughout, the district court here may have erred in denying Volkswagen's § 1404(a) motion, but it acted within its power and jurisdiction in ruling one way or the other on transfer.

In addition, *LaBuy* limited itself to the use of mandamus to enforce court-ordered rules. It specifically distinguished *Banker's Life* because that "case did not concern rules promulgated by this Court but rather, an Act of Congress, the venue statute." 352 U.S. at 257. Hence, on its own terms, *LaBuy* is inapplicable here.

Above all, the district court has not engaged in a "deliberate policy in open defiance" of § 1404(a) or circuit precedent. *Will*, 389 U.S. at 102. Nor did the *en banc* majority rely on past transgressions by this district court or document any pattern of intentional disobedience. *See, e.g., id.* at 102, 105-06 ("record devoid" of necessary pattern). Rather, the district court used conventional formulations of the applicable law and did nothing more than engage in run-of-the-mill discretionary weighing and balancing. The first appellate panel to hear

Volkswagen's petition found that the district court did not intentionally violate, but properly distinguished, *Volkswagen I*. App. 74a. This is simply not a case where mandamus can be justified as necessary supervision under *LaBuy*.[3]

---

[3] Volkswagen attempts to bolster its case for supervisory mandamus by referring to two appellate decisions that post-date the decision below. Opp. at 30-31. In one of these, *In re TS Tech USA Corp.*, __ F.3d __, 2008 WL 5397522 (Fed. Cir., Dec. 29, 2008), the district court's § 1404(a) ruling occurred one month *before* the decision below. *See id.* at * 1. Thus, it cannot provide support for any claim of post-decision disobedience by the district court. The other § 1404(a) ruling post-dated the decision below but involved intra-district transfer and other discrete facts and circumstances with no demonstrated relevance to the present case. *In re Toyota Motor Corp.*, No. 08-41323 (5th Cir., Dec. 19, 2008).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JEFFREY T. EMBRY
HOSSLEY & EMBRY, L.L.P.
320 S. Broadway, Suite 100
Tyler, TX 75702
(903) 526-1772

CARL ROTH
THE ROTH LAW FIRM
115 N. Wellington, Suite 200
Marshall, TX 75670
(903) 935-1665

MARTIN J. SIEGEL
Counsel of Record
LAW OFFICES OF
MARTIN J. SIEGEL, P.C.
815 Walker St., Suite 1600
Houston, TX 77002-5721
(713) 226-8566

MICHAEL C. SMITH
SIEBMAN, REYNOLDS, BURG,
PHILLIPS & SMITH, L.L.P.
713 South Washington Ave.
Marshall, TX 75670
(903) 938-8900

Attorneys for Petitioners